Filed 10/3/03 Parker-Renfrow v. Albertson's, Inc. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

LYLA JEAN PARKER-RENFROW, Plaintiff and Appellant, v. ALBERTSON'S, INC. et al., Defendants and Respondents.	F040559 (Super. Ct. No. 243384-JES) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Kern County. Jon E. Stuebbe, Judge.

Law Offices of Volodar S. Kuzyk, Peter R. diDonato, and Law Offices of Masry & Vititoe for Plaintiff and Appellant.

Stafford & Jackson, Timothy J. Stafford, Susan B. Jackson, and Darren G. Mayers for Defendants and Respondents.

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Appellant Lyla Jean Parker-Renfrow was struck at an intersection by a truck driven by William Buckholdt, doing business as Service Transport (Buckholdt). Appellant's second amended complaint for personal injury damages named, as defendants, Associated Freight Brokers, Inc., Rollinger Transport, Stamoules Produce, Buckholdt, and respondents Albertson's, Inc. and Jewel-Osco, a division of Albertson's, Inc.,[1] as well as the State of California and the County of Kern.[2] Buckholdt and Albertson's were each "motor carriers" registered with the Federal Motor Carrier Safety Administration.

The trial court sustained, with leave to amend, Albertson's general demurrer to the second amended complaint's first cause of action, the only count directed at Albertson's; the cause of action alleged the general negligence of respondents as well as all other named defendants. Based upon appellant's representation that she would not attempt to amend, the court dismissed the action with respect to Albertson's.

DISCUSSION

A.

The trial court did not err in sustaining Albertson's demurrer to the first cause of action of appellant's second amended complaint. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 342 [demurrer sustained without leave to amend where no duty exists]; *Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 777 [an action in negligence requires a

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[1] The second amended complaint alleged that Jewel-Osco is a division of Albertson's Inc. and that both have the "status of a 'motor carrier.'" At argument, counsel represented that he believed Jewel-Osco was a purchasing division of Albertson's. Appellant's responses to interrogatories state that Albertson's holds the license, without any mention of Jewel-Osco. In any event, appellant appears to treat the two entities as one for purposes of the appeal, and we do the same in this opinion, referring to both collectively as "Albertson's."

[2] According to representations of counsel at argument, none of the named defendants other than Albertson's and Jewel-Osco remain in the litigation and they are not parties to the appeal.

showing that defendant owed a legal duty to plaintiff]; *Trear v. Sills* (1999) 69 Cal.App.4th 1341 [complaint subject to demurrer when facts alleged fail to establish duty].) In so far as is relevant, the second amended complaint alleged that each named defendant was the agent of each other named defendant and that, when the accident occurred, Buckholdt was acting as a subhauler who had been hired by Albertson's to haul the products Buckholdt's truck was carrying at the time of the injury to appellant. However, in answer to Albertson's several interrogatories calling for all facts upon which appellant based her allegations that Albertson's had hired Buckholdt to haul produce as an employee or as an independent contractor, appellant responded with the identical answer, as follows:

> "I am informed and believe that Albertson's, Inc., a registered motor carrier, [which] purchased broccoli from Stamoules Farms and made arrangements to have the broccoli picked up from Stamoules Produce. I am informed and believe that Rollinger Transport and Associated Freight Brokers, Inc. were involved with the transportation arrangements, wherein [Buckholdt] was hired as a sub hauler to transport the produce from Stamoules Produce to Albertson's. [Appellant] is in the process of obtaining discovery as to the contract arrangements are [*sic*] still in the discovery stages and as discovery is continuing, [appellant] reserves the right to supplement this [answer] at a later time, up to, as discovery allows, the time of trial."[3]

Because appellant was given an opportunity to amend the first cause of action but failed to do so, the normal rule that the allegations of a pleading must be interpreted liberally in favor of the plaintiff does not apply. (See *Truta v. Avis Rent A Car System,*

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[3] The trial court did not err by taking, at Albertson's request, judicial notice of these discovery responses by appellant. (Evid. Code, § 452, subd. (d); *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 83 [judicially noticed discovery responses of the plaintiff take precedence over inconsistent allegations in the complaint]; *Kahn v. Bower* (1991) 232 Cal.App.3d 1599,1606 [on demurrer, court must accept the allegations of the complaint as true, but may consider matters subject to judicial notice, including facts admitted by plaintiff in the record].)

Inc. (1987) 193 Cal.App.3d 802, 816 [when the plaintiff fails to amend, the reviewing court must conclude that the plaintiff has stated its case as favorably as possible and must therefore resolve all ambiguities in the pleading against the plaintiff]; *Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585 [when party fails to amend after being given an opportunity to do so, it is presumed complaint states as strong a case as possible and judgment of dismissal must be affirmed if the unamended complaint is objectionable on any ground raised by demurrer].) In addition, because the second amended complaint must be construed in light of appellant's interrogatory answers, we view the pleading as if it included the facts set out in the answers and disregard all contrary allegations in the pleading. (See *Bockrath v. Aldrich Chemical Co.*, *supra*, 21 Cal.4th at p. 83; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) In other words, we must assume the first cause of action, read as if it included the interrogatory answers, states all the facts which appellant possesses about the relationship between Albertson's and Buckholdt.[4]

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[4] Though the interrogatory answers left open the possibility of later amendment as a result of subsequent discovery, we cannot decide the issues before us based upon the possibility that different or more precise information favorable to appellant might turn up at a later time. This would permit appellant to use the lack of knowledge and the potential for further discovery to avoid the consequences of an insufficient complaint and render nugatory the defendant's right to challenge a complaint by demurrer. The plaintiff's lack of knowledge does not excuse him or her from the rules governing the pleading of causes of action. Where the plaintiff has insufficient knowledge to truthfully state a good case against a party, the plaintiff need not name the party but may conduct whatever investigation is necessary and then, if sufficient facts are uncovered, bring the party in as a Doe. Moreover, at argument, in response to the court's inquiry as to what facts appellant could now allege if given an opportunity to amend her pleading, her counsel stated that his "understanding" was that Jewel-Osco, the *purchasing* division of Albertson's, called Associated Freight Brokers, Inc., and/or Rollinger Transport to "arrange" for transportation and that Rollinger Transport *hired* Buckholdt. Counsel was unable to identify any documentary evidence or formal discovery responses which established that Buckholdt was a subhauler hired by Albertson's. If there was any doubt that leave to amend should have been granted, it disappeared with these representations

Also, we accept appellant's implicit admission in her brief that Buckholdt was acting as an independent contractor when his truck struck appellant. (*Franklin v. Appel* (1992) 8 Cal.App.4th 875, 893, fn. 11 [appellate court may accept admissions made in a party's brief].) The admission follows from the fact that appellant, in arguing that the first cause of action states a viable claim against Albertson's, relies entirely upon the nondelegable duty doctrine applicable to registered motor carriers engaged as independent contractors to transport goods over public highways.[5] (See, e.g., Rest.2d Torts, § 428[6]; *Eli v. Murphy* (1952) 39 Cal.2d 598, 600.)

B.

The nondelegable duty doctrine recognizes that a highway common carrier is engaged in a high risk business which is fully regulated in order to protect the safety of the general public. (*Eli v. Murphy, supra,* 39 Cal.2d at p. 600.)

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by counsel that, after ample opportunity for discovery, this was the extent of appellant's basis for a nondelegable duty claim against Albertson's.

5 The general rule is that the hirer of an independent contractor is not liable to third parties for the contractor's negligence. (*Fonseca v. County of Orange* (1972) 28 Cal.App.3d 361, 365; *Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 432 [no liability attaches for injuries to third party caused by negligence of independent contractor who was driver hired by local delivery company].)

6 Restatement Second of Torts, section 428, provides that "[a]n individual or a corporation *carrying on an activity which can be lawfully carried on only under a franchise granted by public authority* and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity." (Italics added.) The case cited by appellant at argument, *Serna v. Pettey Leach Trucking, Inc.* (2003) 110 Cal.App.4th 1475, restates the general rule, citing both the Restatement of Torts and *Eli v. Murphy, supra,* 39 Cal.2d 598, but does not extend the rule. Its facts are distinguishable from those at hand. In *Serna*, the issue was whether the rule applied if the subhauler was hauling product (frozen chickens) exempt from federal regulation when the accident occurred. However, there was no dispute that the independent contractor was a subhauler of a motor carrier contracted to transport the chickens.

> "... The effectiveness of safety regulations is necessarily impaired if a carrier conducts its business by engaging independent contractors over whom it exercises no control. If by the same device it could escape liability for the negligent conduct of its contractors, not only would the incentive for careful supervision of its business be reduced, but members of the public who are injured would be deprived of the financial responsibility of those who had been granted the privilege of conducting their business over the public highways. Accordingly, both to protect the public from financially irresponsible contractors, and to strengthen safety regulations, it is necessary to treat the carrier's duties as nondelegable." (*Eli v. Murphy, supra,* 39 Cal.2d at p. 600; see also *Gamboa v. Conti Trucking, Inc.* (1993) 19 Cal.App.4th 663 [a licensed highway common carrier who enters into subhaul agreement with highway contractor liable under principles of *Eli*]; *Lehman v. Robertson Truck-A-Way* (1953) 122 Cal.App.2d 82, 86 [nondelegable duty imposed on common carrier where the common carrier hired an independent contractor to transport goods the common carrier was under contract to transport for a third party; the common carrier "was engaged in an activity only by virtue of the permit it held from the Federal Interstate Commerce Commission"].)

The doctrine thus applies where one carrier hires a second carrier ("subhauler") to perform an obligation incurred by the first carrier, as a licensed carrier, to transport goods on a highway. The relevant information here, however, does not include any such facts, express or necessarily implied. The second amended complaint, with the interrogatory answers, establish nothing more than that Albertson's purchased the broccoli and made arrangements to transport it from the supplier to delivery point. We have been directed to no authority which requires a public license to buy broccoli. There are no allegations or facts that Albertson's was engaged to act as a motor carrier to transport the broccoli and then entered into a subhaul agreement with Buckholdt whereby Buckholdt undertook to do the actual work of transporting the broccoli. Nor are there any allegations or facts that Albertson's entered into any contract with Buckholdt pursuant to which Buckholdt was to transport the broccoli under the auspices of Albertson's motor carrier license; the complaint instead alleges just the opposite -- that Buckholdt was operating under its own license.

Neither the allegation in the second amended complaint that all defendants were "*responsible* for the safe and secure hauling by a motor carrier on interstate public highways," nor the statements in appellant's interrogatory answers that all defendants "*made arrangements* to have the broccoli picked up from Stamoules Produce" and that "Rollinger Transport and Associated Freight Brokers, Inc. were *involved with the transportation* arrangements, wherein [Buckholdt] was hired as a sub hauler to transport the produce from Stamoules Produce to Albertson's," are sufficient to establish that Buckholdt was hauling produce as a contract subhauler for Albertson's. "Responsible," "made arrangements," and "involved with" are all conclusions, not facts, and raise only ambiguity with respect to the actual relationships among the named defendants with respect to the transportation of the broccoli.[7] While we might under other circumstances be required to construe these uncertainties favorably to appellant, this is not so here where appellant declined leave to amend. (*Truta v. Avis Rent A Car System, Inc.*, *supra*, 193 Cal.App.3d at p. 816; see also *Adult Film Association v. Times Mirror Co.* (1979) 97 Cal.App.3d 77, 81 [paper's demurrer sustained where pleading alleges only that paper "induced" others to reject advertising, and no factual allegations that paper did anything to suggest that competitors reject plaintiff's ads].)

As we understand appellant's position, an entity holding a motor carrier license is automatically subject to liability under the nondelegable duty doctrine for any harm resulting from an accident involving an independent motor carrier which at the time of the accident was transporting goods in which the entity had an interest, even if the entity had nothing to do with the hiring of the independent carrier. This notion of virtually unlimited liability is unsupported by any authority we know of, and, if adopted, would

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[7] Likewise, the statements in the interrogatory answers are not specific about which defendant actually "hired" Buckholdt "as a subhauler." We would describe the tone of appellant's interrogatory answers as consciously evasive.

extend the rule and rationale of *Eli* and its progeny well beyond legal and logical limits. We will not endorse it.

Not having presented ultimate facts which, if proved, would establish a duty of care on the part of Albertson's to appellant, appellant has not pled a cause of action for negligence against Albertson's. Thus, the trial court correctly dismissed the second amended complaint with respect to Albertson's when appellant declined to amend her first cause of action.[8]

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Albertson's.

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Dibiaso, Acting P.J.

WE CONCUR:

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Cornell, J.

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Gomes, J.

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[8] Appellant's brief does not contend that she stated a cause of action against respondents on any ground other than the nondelegable duty imposed on common carriers. (Rest.2d Torts, § 428.) In the trial court, appellant argued that a duty should be imposed upon Albertson's as a matter of public policy because, given the risk of transporting goods on public highways, the forseeability of harm was great. This claim has not been repeated on appeal, and wisely so, since forseeability alone does not establish a duty of care. (*Trear v. Sills, supra,* 69 Cal.App.4th at pp. 1347-1348.)